Supreme Court, U.S.
FILED

(1) 95-727 NOV 2 - 1995

OFFICE OF THE CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

WILLIAM SCOTT MCCOTTER,

Petitioner

v.

COMMONWEALTH OF VIRGINIA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Where a defense attorney's conduct at the conclusion of the Commonwealth's case in chief was incomprehensible, did his action in resting the defendant's case without putting on any evidence constitute a voluntary, knowing, and intelligent waiver by the defendant of his constitutional right to testify in his own defense, where such a waiver was not otherwise apparent?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings, including those listed in the caption are:

Petitioner

William Scott McCotter

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Richmond, Virginia 23219
(804) 788-4444

Respondent

Commonwealth of Virginia

Counsel: Robert J. Humphreys
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PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR A WRIT OF CERTIORARI

Petitioner, WILLIAM SCOTT MCCOTTER, respectfully petitions for a writ of certiorari to review the judgment and opinion of the Supreme Court of Virginia entered in this case on August 4, 1995.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia is unreported and is reprinted in the appendix to this Petition ("App.") at App. 1a. The order and opinion of the Court of Appeals of Virginia denying the petitioner's petition for appeal is unreported and is reprinted in the appendix at App.2a. The order and judgment of the Circuit Court of

Virginia Beach is unreported and is reprinted in the appendix at App. 6a.

GROUNDS FOR JURISDICTION

The respondent initiated this case by filing criminal charges against the petitioner. The Circuit Court of Virginia Beach tried the petitioner on September 20-21, 1993. On November 29, 1993, the petitioner was sentenced to 70 years in the Virginia Department of Corrections. On December 20, 1993, the Circuit Court of Virginia Beach denied the petitioner's motion for a new trial.

The petitioner filed a timely notice of appeal to the Court of Appeals of Virginia. On February 10, 1995, the Court of Appeals of Virginia denied the petitioner's petition for appeal.

The petitioner filed a timely notice of appeal to the Supreme Court of Virginia. On August 4, 1995, the Supreme Court of Virginia denied the petitioner's petition for appeal.

The jurisdiction of this court to review the judgment of the Supreme Court of Virginia is invoked under 28 U.S.C. § 1257. Pursuant to Supreme Court Rule 13.1 and 13.3, this Petition is filed within 90 days of the denial by the Supreme Court of Virginia of petitioner's timely petition for appeal.

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land

or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.. CONST. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature of the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The petitioner, hereinafter referred to as the defendant, was indicted and tried on state charges alleging abduction with intent to defile, attempted forcible sodomy, and malicious bodily injury. Upon arraignment, he entered pleas of not guilty and not guilty by reason of insanity.

At the conclusion of the Commonwealth's case in chief, a bizarre and unintelligible colloquy occurred between defense counsel and the trial court. (App 9a-11a). During defense counsel's remarks to the court, he purported to withdraw the defendant's plea of not guilty by reason of insanity, and alternated between resting the defense case and not resting. Neither the court, the Commonwealth's Attorney, nor the defendant understood counsel's statements or behavior.

At the time of trial, the Commonwealth conceded that a jury issue existed with respect to a defense of insanity. Defense counsel requested that a forensic psychologist be allowed to remain in the courtroom throughout the trial. At one point during trial, the court stated "[a]s I understand, you are going to call Doctor Gwaltney to testify" on the issue of sanity.

The defendant stated at sentencing and during the hearing on his motion for a new trial that he did not waive his right to testify, or want to rest his case. He first learned of his attorney's decisions in these respects when his attorney told the court "the defense rests." The defendant said he tried to interrupt and stop his attorney, but was admonished to remain silent. He wanted to say something

to the court, but was again ordered not to do so by his attorney. He was afraid of being held in contempt, or of being restrained by the courtroom deputies who drew near every time he stood. He did not know that the right to testify was a right which only he could waive.

At sentencing, in a subsequent motion for a new trial, and on appeal in the Court of Appeals and the Supreme Court of Virginia, the defendant raised the federal question sought to be reviewed. He raised the question in the trial court by moving for a new trial. The trial court denied this motion. App.6a. He raised the question on appeal in both appellate courts in his questions presented and assignments of error, and both courts denied discretionary review.

REASONS FOR GRANTING WRIT

SUMMARY

In denying the defendant's petition for appeal for relief from convictions imposed despite the defendant's failure to make a voluntary, knowing, and intelligent waiver of his constitutional right to testify, the Supreme Court of Virginia has rendered a decision which not only conflicts with fundamental principles of constitutional criminal procedure, but also conflicts with the decisions of this Court.

Over 45 years ago, this Court recognized that a person's right "to be heard in his defense ... [is] basic in our system of jurisprudence. In re Oliver, 333 U.S. 257, 273 (1948). In Rock v. Arkansas, 483 U.S. 44, 52 (1987), this

Court stated that "the most important witness for the defense in many criminal cases is the defendant himself." The importance of the right necessitates restrictions on the waiver of the right. The waiver of the right to testify, like the waiver of other fundamental constitutional rights, must be made voluntarily and knowingly by the defendant. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938)(waiver of a fundamental and personal right must be intentional and knowing).

The decision of the Supreme Court of Virginia permits a defendant's right to testify to be waived by defense counsel without his knowing and intelligent consent. Furthermore, the decision imposes no duty on the trial court to protect the rights of the defendant even where circumstances are present that indicate the defendant is not knowingly, voluntarily, and intelligently waiving his right to testify. As a result, criminal defendants are unfairly deprived of this fundamental constitutional right.

I. THERE IS A NEED FOR UNIFORMITY ON FUNDAMENTAL ISSUES OF CRIMINAL PROCEDURE.

One of the purposes of the Court's certiorari jurisdiction is to ensure uniformity of decisions among the state and Circuit courts concerning federal constitutional law. The issues presented in this case not only involve conflicts with well established precedent of this Court, but also with decisions in other states and Circuits.

This Court has held that the right of an accused to

testify in his own behalf is a fundamental constitutional right. Rock v. Arkansas, 483 U.S. 44, 51 (1987); Faretta v. California, 422 U.S. 806, 834 n.45 (1975)("[e]very criminal defendant is privileged to testify in his own defense" (quoting Harris v. New York, 401 U.S. 222, 225 (1971)). This right is a personal right, which only the defendant has the ultimate authority to exercise or waive. United States v. McMeans, 927 F.2d 162 (4th Cir. 1991); see Jones v. Barnes, 463 U.S. 745, 751 (1983). The right to testify may not be waived by counsel. See Wainwright v. Sykes, 433 U.S. 72, 93 n.1 (1977) (Burger, J., concurring); United States v. Teague, 953 F.2d 1525 (11th Cir.), *cert. denied*, 113 S.Ct. 127 (1992); Rogers-Bey v. Lane, 896 F.2d. 279, 283 (7th Cir.), cert. denied, 498 U.S. 831 (1990); United States v. Lively, 817 F.Supp. 453 (D.Del.), *aff'd*, 14 F.3d 50 (3d Cir. 1993).

The waiver of the constitutional right to testify, like the waiver of other fundamental constitutional rights, must be made voluntarily and knowingly by the defendant. See e.g., Patton v. United States, 281 U.S. 276 (1930)(waiver of right to jury trial must be made voluntarily, knowingly, and intelligently); Johnson v. Zerbst, 304 U.S. 458, 464 (1938)(waiver of a fundamental and personal right must be intentional and knowing); see McMeans, 927 F.2d at 163 ("to waive the right [to testify], defendant needs to know [that the] right to testify exists"); United States v. Bernloehr, 833 F.2d 749, 751 (8th Cir. 1987); Lema v. United States, 987 F.2d 48, 53 (1st Cir. 1993).

The decision of the Supreme Court of Virginia contravenes these principles regarding fundamental

constitutional rights. This Petition should be granted to secure conformity with this Court's precedence.

II. THERE IS A NEED FOR THIS COURT TO DETERMINE UNDER WHAT CIRCUMSTANCES AND TO WHAT EXTENT A WAIVER OF A DEFENDANT'S RIGHT TO TESTIFY MUST APPEAR ON THE RECORD.

Trial courts must ensure that purported waivers of fundamental constitutional rights by criminal defendants are made voluntarily, knowingly, and intelligently. Brady v. United States, 397 U.S. 742, 748 (1970). The question of what suffices as a waiver of the right to testify has received mixed treatment, and has been answered in a variety of ways. Some courts have imposed upon the trial judge a duty to inquire of the defendant directly whether he wants to testify. People v. Curtis, 681 P.2d 504, 514-15 (Colo. 1984); State v. Neuman, 371 S.E.2d 77, 81-82 (W.Va. 1988); Culberson v. State, 412 So. 2d 1184, 1186 (Miss. 1982).

The Ninth Circuit has held that the court has no obligation to make such a inquiry and has no duty to advise the defendant of his right to testify. United States v. Martinez, 883 F.2d 750 (9th Cir. 1989), *cert. denied*, 501 U.S. 1249 (1991).

Other courts have refused to require a waiver on the record in all cases, but have recognized that certain circumstances may warrant such an inquiry. United States v.

Pennycooke, 65 F.3d 9 (3d Cir. 1995)(inquiry required if defendant has expressed his desire to testify and counsel has told the court that the defendant will not testify); United States v. Thompson, 944 F.2d 1331 (7th Cir. 1991), *cert. denied*, 502 U.S. 1097 (1992)(inquiry not required absent indication that the defendant has been prevented from testifying); *see also* Ortega v. O'Leary, 843 F.2d 258, 263 (7th Cir.), cert. denied, 488 U.S. 841 (1988)(no affirmative duty to inquire but "a trial court should carefully ascertain through a methodical inquiry whether...[the right to testify]... has been voluntarily and intelligently forfeited"); United States v. David, 511 F.2d 355 (D.C. Cir. 1975)(question of mental status will require inquiry beyond written waiver of jury trial); State v. Likakur, 613 P.2d 156 (Wash. App. 1980)(same).

This Petition should be granted to ensure the uniform resolution of this fundamental question of criminal procedure, and to correct the injustice created by the holding of the court below.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision below.

RESPECTFULLY SUBMITTED
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1001 East Broad Street
Suite 210
Richmond, Virginia 23219
(804) 788-4444
Attorney for Petitioner

No. 95- _____

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v.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO
THE SUPREME COURT OF VIRGINIA

APPENDIX TO PETITION

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 4th day of August, 1995.

William Scott McCotter, Appellant,

against Record No. 950461
Court of Appeals No. 0004-94-1

Commonwealth of Virginia, Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

And it is ordered that the Commonwealth recover of the appellant the costs in the courts below.

A Copy,
Teste:
David B. Beach, Clerk

By: /s/
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Friday the 10th day of February, 1995.

William Scott McCotter, Appellant,

against Record No. 0004-94-1
Circuit Court No. CR93-390

Commonwealth of Virginia, Appellee.

From the Circuit Court of the City of Virginia Beach Before Judge Baker, Senior Judge Hodges and Retired Judge Godwin*

This petition for appeal is denied for the following reasons:

William Scott McCotter (appellant) was convicted of abduction with the intent to defile and malicious bodily injury by jury trial in the Circuit Court of the City of Virginia Beach. On appeal, appellant asserts that (1) he did not make a voluntary, knowing, and intelligent waiver of his right to testify and to present evidence in his behalf, (2) he did not make a voluntary, knowing, and intelligent withdrawal of his pleas of not guilty by reason of insanity, (3) the trial court erred in not conducting a voir fire of appellant to ensure that counsel's actions represented appellant's voluntary, knowing ,and intelligent waiver of

fundamental constitutional rights, (4) and (5) the trial court erred in not granting appellant's motion for a new trial.

I., II., and IV. "[T]he credibility of witnesses and the weight accorded their testimony are matters solely for the fact finder who has the opportunity of seeing and hearing the witnesses." Schneider v. Commonwealth, 230 Va. 379, 382 337 S.E.2d 735, 736-37 (1985).

Appellant testified at the hearing on a motion for new trial, unsupported by testimony of affidavit from trial counsel, that counsel refused to permit him to testify and unilaterally withdrew his pleas of not guilty by reason of insanity. By denying the motion for new trial, the trial court refused to credit appellant's testimony regarding the extra-record matters occurring between counsel and appellant. The trial court did not err in denying the motion for new trial based on counsel's withdrawal of the insanity plea and counsel's alleged refusal to allow appellant to testify on his own behalf. Cf. Underwood v. Clark, 939 F. 2d 473, 476 (7th Cir. 1991)(in collateral attack on conviction, defendant must produce something more than bare, unsubstantiated, self-serving, statement that lawyer forbade him to take the stand).

III. The trial court had no duty to inquire on the record whether appellant, represented by retained counsel, knowingly and voluntarily withdrew his pleas of not guilty by reason of insanity. Appellant had entered pleas of not guilty and not guilty by reason of insanity at the start of trial. Therefore, when counsel noted a withdrawal of the insanity plea, appellant's personally entered plea of not guilty was still in effect. The trial court did not er in not

conducting a colloquy with appellant personally on the withdrawal of the insanity plea.

Moreover, the trial court need not discuss a represented defendant's right to testify or obtain an on the record waiver by the defendant of that right. See generally United States v. McMeans, 927 F.2d 162, 163 (4th Cir. 1991). The trial court did not err in not questioning appellant on this matter.

V. A defendant must meet four requirements in order to secure a new trial based on newly-discovered evidence. He must show that "(1) the evidence was discovered after trial; (2) it could not have been obtained prior to trial through the exercise of reasonable diligence; (3) it is not merely cumulative, corroborative or collateral; and (4) is material, and as such, should produce an opposite result on the merits at another trial." Mundy v. Commonwealth, 11 Va. App. 461, 480, 390 S.E.2d 525, 535, aff'd on rehearing en banc, 399 S.E.2d 29 (1990). The burden is upon the proponent of after-discovered evidence to show that all requirements have been met. Carter v. Commonwealth, 10 Va. App. 507, 512-13, 393 S.E.2d 639, 642 (1990). Such a motion is addressed to the sound discretion of the trial court and a denial will not be reversed absent an abuse of discretion. Mundy, 11 Va. App. at 481, 390 S.E.2d at 536.

In this case, appellant did not establish that the information presented after trial could not have been discovered prior to trial upon exercise of due diligence. Appellant's fiancee testified at a bond hearing well before trial that appellant exhibited changes in his behavior upon his return from Saudi Arabia. Appellant had suggested to

one of his attorneys that a post traumatic stress disorder defense should be explored with defense mental health experts.

Moreover, the evidence presented at the hearing on the motion for a new trial was that appellant may have been exposed to neurotoxins in Saudi Arabia. Appellant's expert, Dr. Peck, testified only that he was "very concerned about the possibility that this patient's neuropsychological impairments are in some way associated with neurotoxin exposure." Appellant's evidence failed to show he actually was exposed to neurotoxins and that such exposure caused him to be legally insane. Thus, this after-discovered evidence is not likely to produce a different result at a new trial. The trial court did not abuse its discretion in denying the motion for a new trial on the basis of newly-discovered evidence.

---

*Retired Judge James C. Godwin took part in the consideration of this case by designation pursuant to Code § 17-116.01.

A Copy,

Teste:
Richard R. James, Clerk
By: /s/
Deputy Clerk

CIRCUIT COURT OF VIRGINIA BEACH
TRANSCRIPT
December 20, 1993

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....

THE COURT: All right, sir. All right. Then that concludes the evidence for this hearing today; and based upon the evidence presented, the court is not of the opinion that the motion for a new trial should be sustained....

....

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

DATE: 11/29/93
JUDGE: SHADRICK

COMMONWEALTH OF VIRGINIA
VS
WILLIAM SCOTT MCCOTTER, DEFENDANT
SSN: 229-29-2245
DOB: 12/10/68

OFFENSE	SECTION	DATE
ABDUCTION WITH INTENT TO DEFILE	18.2-48	11/10/92
MALICIOUS BODILY INJURY	18.2-51	11/10/92

SENTENCING ORDER - CASE NO: CR93-390
Court Reporter: C. Smith

This day came A. Alberi, attorney for the Commonwealth, the defendant, in person, and S. Benjamin, attorney for the defendant.

The jury, on 9/21/93, found the defendant GUILTY of the above offenses and the Court referred this matter to the probation office of this Court for a presentence report on the motion of the defendant, by counsel.

The presentence report was received by this Court, the counsel for the defendant and the attorney for the Commonwealth in the manner prescribed by law. The

probation officer's report was ordered filed as a part of the record in this case.

Before pronouncing sentence the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why the judgment should not be pronounced.

In accordance with the jury's verdict, the defendant is sentenced to confinement in the penitentiary for the term of:

ABDUCTION WITH INTENT TO DEFILE:	50 YEARS
MALICIOUS BODILY INJURY:	20 YEARS

The defendant shall pay court costs of $1,218.00 after release from confinement.

The Clerk shall send a copy of this order to the Sheriff and to the Director of the Department of Corrections.

The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to § 53.1-187.

The defendant is remanded to custody.

/s/
Judge

CIRCUIT COURT OF VIRGINIA BEACH
TRANSCRIPT
SEPTEMBER 21, 1993

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MR. SUTTON: Judge, at this point, the defendant rests, withdraws his pleas of not guilty by reason of insanity and would wish to make arguments on the motion to strike at the close of the Commonwealth's evidence at this time as soon as we notified Mr. Denton and other necessary witnesses also would like to make its arguments, any argument, as to the motion to strike at the close of the evidence.

THE COURT: I don't understand what you are saying. What are you saying?

MR. SUTTON: I said the defense rests and renew my motion to strike, but I would like to make both motions to strike after we have afforded Mr. Denton the --

THE COURT: The defense has rested. That is the case.

MR. SUTTON: Well, I ask that as a condition to be able to notify Mr. Denton that I reserve the right to make my motion to strike the Commonwealth's evidence at the close of the Commonwealth's evidence.

THE COURT: The Commonwealth has rested. If you have a motion to strike, now is the time to be heard.

MR. SUTTON: Very well, Judge....

.....

THE COURT: This is a motion to strike at the conclusion of all of the evidence.

MR. SUTTON: No, sir. I'm not quarreling with the court, but the court said I had to make the first one first.

My understanding is that the court said I had to back up if I was going to make a motion at the close of the Commonwealth's evidence I should do it now and not reserve the right to do it later.

My motion is as to the burden of going forward. That is the language the court reporter will find. I'm confused too. I respectfully submit that I was confused because I made the motion to reserve my argument on the close -- to strike the evidence at the close of the Commonwealth's evidence in a few minutes. Said that I would rest. Said that the defendant would withdraw his plea of not guilty by reason of insanity and then asked again to reserve to make the motion to strike at the conclusion of all of the evidence so we could just get that on the record and go call Mr. Denton. The court as I understood it told me if I'm going to make a motion at the close of the Commonwealth's evidence I must do it now.

I understand I'm back to that point. That was the argument that I just made on the record. That is the argument that was presented, discussing preponderance of the evidence, what a reasonable fact finder would find.

At this point, I have not rested because the court instructed me that it is my understanding that I must make the motion to strike at the close of the Commonwealth's evidence. That is where I understand that I am because that

is what I understand the court told me to do. If I misunderstood --

THE COURT: Mr. Sutton, let me just say this. I'm glad to hear that you understand where you are.

MR. SUTTON: That is what I understood.

THE COURT: Because you have gotten me thoroughly confused. Let's follow this through step by step here. You reserved a motion to strike the Commonwealth's evidence and then you rested.

MR. SUTTON: I asked to do that. I never was told my understanding that I could do that. My understanding was the court told me --

THE COURT: What do you want to do. Mr. Sutton?

MR. SUTTON: I made my argument at the close of the Commonwealth's evidence. That is what I understood the court told me to do.

....